

# Additional Commercial Contract Types and Payments Under T&M/LH Contracts

Public Meeting  
October 18, 2005



# Agenda

Opening	Robin Schulze, DoD
Welcome	Rob Burton, OMB
Legislative Authority for Commercial T&M/LH	Mathew Blum, OMB
OFPP Recommendations	Mathew Blum, OMB
Non-Commercial T&M Issues	Dave Capitano, DoD
Compare Commercial and Non-Commercial T&M Requirements	Dave Capitano, DoD Robin Schulze, DoD



# Ground Rules

- Purpose is to hear the views of all interested parties
- Meeting is not being held to achieve consensus or to write the rule itself
- Be respectful of other peoples views
- Please speak into microphones so all attendees can hear discussions



# Dates

- Flip chart bullets from this meeting will be posted by October 28, 2005 at <http://www.acq.osd.mil/dpap/dars/index.htm>
- Public comment period for proposed rules closes November 25, 2005



# **Commercial T&M & LH Contracts**



# **Legislative Authority**

Service Acquisition Reform Act (SARA) expressly authorized the use of time-and-materials (T&M) and labor-hour (LH) contracts for the acquisition of commercial services under specified conditions



# Specified Conditions

- Commercial services procured for support of a commercial item as described in section 4(12)(E) of the OFPP Act -
  - Installation, maintenance, repair, training, and other services if the-
    - Services are procured for support of a commercial item
    - Offeror provides similar services to the public under similar terms and conditions



# Specified Conditions

- Any other category of commercial services designated by OFPP on the basis that:
  - Service is commonly sold to the general public using T&M or LH contracts
  - Best interests of the Government to authorize use of T&M or LH contracts



# Use of T&M and LH Contracting by General Public

- OFPP (w/Councils' support) reviewed information on types of services commonly acquired by the general public on a T&M/LH basis & circumstances for use
- Information considered included:
  - Public comments on ANPR
  - Oral comments at public meeting on ANPR
  - GAO survey of private sector practices



# Use of T&M and LH Contracting by the General Public

- OFPP made 3 findings:
  1. T&M and LH contracts are commonly used when requirements are not sufficiently well understood & risk can be managed
  2. Commercial services sold on a T&M or LH basis are also generally offered on a FP basis
  3. A few types of services are sold predominantly on a T&M and LH basis (emergency repair services)



# OFPP Recommendations on Authorized Use

- Allow agency to purchase any commercial service on a T&M or LH basis if the following conditions are met:
  1. D&F is issued w/ sufficient facts & rationale to justify that a FP arrangement is not suitable
  2. Other conditions of section 8002(d) are met



# **OFPP Recommendations on Authorized Use**

D&F supporting use of T&M and LH contract must:

- Identify market research conducted
- Establish that it is not possible at time of placing or contract or order to accurately estimate extent or duration of work or to anticipate costs with any reasonable degree of certainty
- Establish that requirement has been structured to maximize use of FP contracts (e.g., by limiting value or length of T&M/LH contract or order)



# **OFPP Recommendations on Authorized Use**

- D&F for contract extension or renewal of recurring need must establish why T&M or LH pricing is still required -- e.g., why knowledge gained from prior acquisition could not be used to further refine requirements & acquisition strategy to enable purchase on a FP basis



# OFPP Recommendations on Authorized Use

- Contracts with both FP and T&M/LH pricing may be established but D&Fs need to be executed for orders using T&M and LH pricing
- Terms & conditions need to adequately protect the parties' respective interests based on the risk each party is being asked to bear



# **Additional Statutory Conditions for Authorized Use**

- Must use competitive procedures
- Contract includes ceiling price that the contractor exceeds at its own risk
- “Best interest of the Government” determination for changes in ceiling price



# **Additional Input Sought on Authorized Use**

- Additional comment sought to inform findings and conclusions
  - Include citations, as appropriate, to relevant sources of information to substantiate basis for response
  - We are particularly interested in how prices are established when the general public uses T&M/LH contracts



# **Non-Commercial T&M & L/H Contracts**



# Non-Commercial T&M Contracts

## Payment Clause

- Problems Identified with Existing Payment Clause
  - Definition of Materials
  - Reimbursement of Subcontract Costs
  - Contractor Furnished Material
  - Profit or Fee on Materials
  - Reimbursement of Interdivisional Transfers



# Commercial and Non- Commercial T&M/LH Requirements Comparison



# Appropriate Use

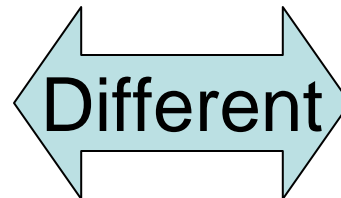
## Commercial

- Must use competitive procedures

## Non-Commercial

- May be sole source

*Proposed 12.207(b)(1)*



*FAR 6.3*



# Appropriate Use

## Commercial

- Determination and finding (D&F) no other contract type is suitable
- Contract includes ceiling price that contractor exceeds at his own risk

*Proposed 12.207(b)(1)*

## Non-Commercial

- Same as commercial
- Same as commercial

*FAR 16.601(c)*



# Appropriate Use

## Commercial

- Justification for changes to ceiling price
- Requirement to document market research

*Proposed 12.207(b)(1)*

## Non-Commercial

- Same as commercial
- Same as commercial

*FAR 16.601(c) and  
FAR 10.002(e)*



# Appropriate Use

## Commercial

- Requirement to establish appropriate conditions for use exist, i.e., not possible to-
  - Accurately estimate the extent or duration of the work
  - Anticipate costs with any reasonable degree of certainty

*Proposed 12.207(b)(2)*

## Non-Commercial

- Same as commercial

*FAR 16.602(b)*



# Appropriate Use

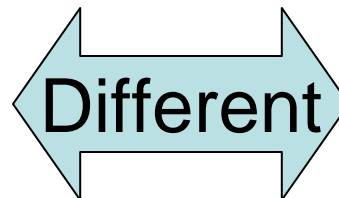
## Commercial

- Requirement to structure contract to maximize the use of fixed price contracts on future acquisitions

## Non-Commercial

- Avoid protracted use of T&M contracts after experience provides a basis for firmer pricing

*Proposed 12.207(b)(2)*



*FAR 16.103(c)*

Different wording but both require use of firmer pricing as soon as circumstances permit



# IDIQ – D&F Level

Contract provides only for T&M and LH orders-

## Commercial

- D&F at contract level

*Proposed 12.207(c)*

## Non-Commercial

- Same as commercial

*FAR 16.601(c)*



# IDIQ – D&F Approval Level

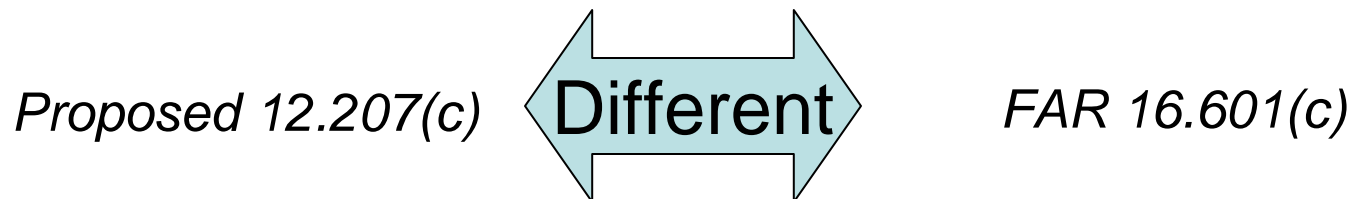
Contract provides only for T&M and LH orders-

## Commercial

- D&F approved one level above CO

## Non-Commercial

- CO approves D&F





# IDIQ – D&F Level

Contract provides for T&M, LH, FFP, and FFP EPA orders-

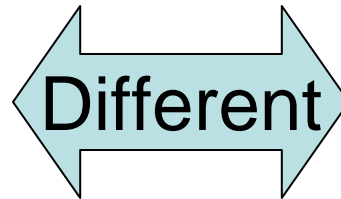
## Commercial

- D&F for each T&M/LH order

## Non-Commercial

- D&F at contract level

*Proposed 12.207(c)*



*FAR 16.601(c)*



# IDIQ – D&F Approval Level

Contract provides for T&M, LH, FFP, and FFP EPA orders-

## Commercial

- No higher level approval required

*Proposed 12.207(c)*

## Non-Commercial

- Same as commercial

*FAR 16.601(c)*



# Inspection and Acceptance

## Commercial

- Pay for replacement and reperformance, without profit, up to ceiling price

*Proposed 52.212-4  
Alt I paragraph (a)*

## Non-Commercial

- Same as commercial

*FAR 52.246-6*



# Direct Labor

## Commercial

- *Fractional hours payable on prorated basis*
- *Overtime must be approved in advance*

*Proposed Alt I paragraph (a)*

## Non-Commercial

- *Same as commercial*  
*FAR 52.232-7(a)(2)*
- *Same as commercial*  
*FAR 52.232-7(a)(3)*  
*and Proposed 52.232-7(a)(3)*



# Direct Labor

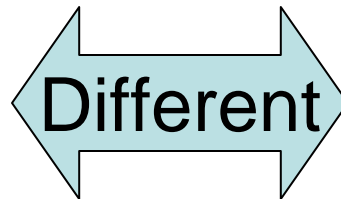
## Commercial

- *No withhold*

## Non-Commercial

- *COs may withhold*

*Proposed Alt I  
paragraph (a)*



*FAR 52.232-7(a)(2)*



# Materials Definition

- Direct materials, including supplies and services transferred between divisions, subsidiaries, or affiliates of the contractor under a common control;
- Subcontracts for supplies and services;
- Other direct costs (e.g., travel, computer usage charges, etc.); and
- Indirect costs specifically provided for in this clause.

*Commercial Proposed Alt I paragraph (e)*  
*Non-Commercial Proposed 16.601(a)*

Same for Commercial and Non-Commercial



# Three Methods for Reimbursement of Material Costs



# Material Reimbursement

## Method 1

### Commercial

- *Contractor's commercial items at catalog or market price*
  - *No “most favored customer” price requirement*

*Proposed Alt I paragraph (i)(1)(ii)*

### Non-Commercial

- *Same as commercial*

*Proposed 52.232-7(b)(3)*



# Material Reimbursement Method 2

## Commercial

- *Subcontracts at the schedule rates when listed in the contract or IDIQ order*

*Proposed Alt I paragraph (i)(1)(ii)*

## Non-Commercial

- *Same as commercial*

*Proposed 52.232-7(b)(4)*



# Material Reimbursement Method 3

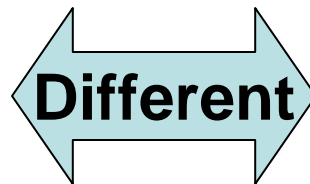
## Commercial

- *Actual costs less rebates, refunds, or discounts*

## Non-Commercial

- *Allowable actual cost subject to FAR 31.2*

*Proposed Alt I paragraph  
(i)(1)(ii)(D)*



*52.232-7(b)(5) and  
Proposed 52.232-7(b)(5)*



# Material

## Commercial

- *“Most advantageous” prices to the extent able*

*Proposed Alt I paragraph  
(i)(1)(ii)(D)*

## Non-Commercial

- *Same as commercial*

*52.232-7(b)(5) and  
Proposed 52.232-7(b)(8)*



# Material

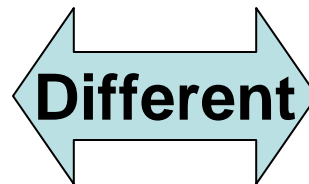
## Commercial

- *Credit to Government for cash and trade discounts, rebates, scrap, and commissions*

## Non-Commercial

- *Contractor must take and give Government credit for cash and trade discounts, rebates, allowances, credits, salvage, commissions, and other benefit*

*Proposed Alt I paragraph  
(i)(1)(ii)(D)*



*52.232-7(b)(5) and  
Proposed 52.232-7(b)(8)*



# Material

## Commercial

- *Profit or fee only on commercial materials*

## Non-Commercial

- *Same as commercial*

*Proposed Alt I paragraph  
(i)(1)(ii)(D)*

*Proposed 52.232-7(b)(8)*



# Other Direct Costs

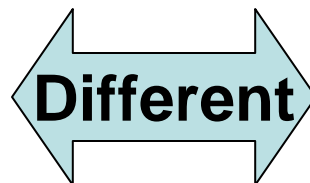
## Commercial

- *Reimbursed at actual cost*
- *Only for categories of ODC listed in the contract*

## Non-Commercial

- *Reimbursed at actual allowable cost in accordance with FAR 31.2*
- *No listing*
  - *In accordance with the contractor's written or established accounting practices*

*Proposed Alt I paragraph  
(i)(1)(ii)(E)(1)*



*FAR 52.232-7(b) and  
Proposed 52.232-7(b)(6)*



# Indirect Costs

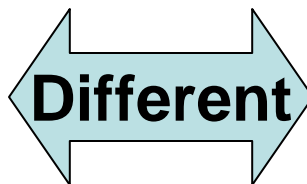
## Commercial

- *Fixed negotiated amount reimbursed on pro-rata basis over period of contract performance*

## Non-Commercial

- *Reimbursed at actual allowable cost in accordance with FAR 31.2*

*Proposed Alt I paragraph  
(i)(1)(ii)(E)(2)*



*FAR 52.232-7(b) and  
Proposed FAR 52.232-7(b)*



# Total Costs

## Commercial

- *Costs shall not exceed ceiling*
- *“Best efforts” to perform within ceiling*
- *85% ceiling price notification required*

*Proposed Alt I paragraph (i)(2)*

## Non-Commercial

- *Same as commercial*

*FAR 52.232-7(c) and  
Proposed 52.232-7(c)*



# Ceiling Price

## Commercial

- *Government not obligated to pay amounts in excess of ceiling*
- *Contractor not obligated to continue to perform over ceiling*

*Proposed Alt I paragraph (i)(3)*

## Non-Commercial

- *Same as commercial*

*FAR 52.232-7(d) and  
Proposed 52.232-7(d)*



# Access to Records - Labor

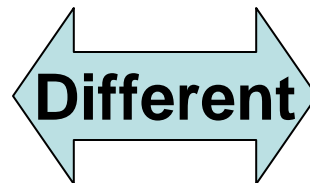
## Commercial

- *Access specified in contract*
- *Timecard substantiation-*
  - *Original timecards*
  - *Records to verify employee qualifications*
  - *Records that show distribution of labor between jobs*
  - *Access to employees*

*Proposed Alt I  
paragraph (i)(4)*

## Non-Commercial

- *All records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of the contract*



*FAR 52.215-2*



# Access to Records - Material

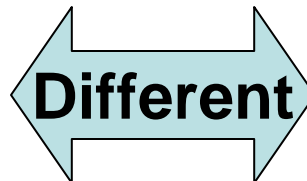
## Commercial

- *Materials reimbursed at actual cost-*
  - *Invoices and subcontract agreements*
  - *Documentation supporting payment of invoices*

## Non-Commercial

- *All records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of the contract*

*Proposed Alt I paragraph (i)(4)*



*FAR 52.215-2*



# Termination for Convenience

## Commercial

- *Direct labor at hourly schedule rates*
- *Other reasonable charges*

*Proposed Alt I paragraph (I)*

## Non-Commercial

- *Same as commercial*

*FAR 52.249-6, Alt IV*



# Subcontract Consent

## Commercial

- *Approved purchasing system, consent required only when specified in contract*

*Proposed Alt I paragraph (u)*

## Non-Commercial

- *Same as commercial*

*FAR 52.232-7(b)(10)  
And Proposed 52.232-7(b)(9)*



# Subcontract Consent

## Commercial

- *No approved purchasing system, consent required-*
  - *Cost reimbursement, T&M, LH*
  - *FFP over specified thresholds*

*Proposed Alt I paragraph (u)*

## Non-Commercial

- *Same as commercial*

*FAR 52.232-7(b)(10)  
And Proposed 52.232-7(b)(9)*



# Subcontract Consent

## Commercial

- *Reimbursement without consent at sole discretions of Government*

*Proposed Alt I paragraph (u)*

## Non-Commercial

- *Same as commercial*

*FAR 52.232-7(b)(10)  
And Proposed 52.232-7(b)(9)*